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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No. 754

W. S. KIRDENDALL, et al.,

Petitioners,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY,
a Corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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W. G. KORDEWICK, HENRY POTRAFKE, LAWRENCE E. PECOR, WALTER H. MILLER, B. J. BELLAND, C. T. JEWELL, W. F. CARLSON, HEATHER BROWN, W. T. GRAHAM, J. W. ROSS, R. B. LOGAN, J. E. FENNELL, E. D. GIBBS, WILLIAM C. WASSNER, CLARENCE E. BENSON, A. J. FALSTER, J. H. MAHER, W. D. HULL, J. A. RICHERME, B. J. HAINSWORTH, BEADY HINES, L. D. WHITWORTH, M. F. HOLOBOWSKI, LEO LA BEAU, H. PROUE, T. W. BRIGGS, W. H. WILDE, S. W. SLUSSER and JAMES HULL,

Petitioners,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, filed October 19, 1946, appears in the printed record (pp. 30-33). This opinion was released on November 18, 1946 for publication. It has not yet been reported.

JURISDICTION.

Petitioners are seeking to invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, Sec. 1, 43 Stat. 1938; U. S. Code, Title 28, Sec. 347).

QUESTION PRESENTED.

The question presented is whether the Seventh Circuit Court of Appeals followed the applicable Illinois law in holding that Petitioners' alleged cause of action was barred by the Illinois five-year statute of limitations.

STATEMENT OF THE CASE.

Petitioners have requested a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed an order of the United States District Court, for the Northern District of Illinois, Eastern Division, dismissing this cause on motion of Respondent for failure to state a cause of action entitling the Petitioners to relief (R. 20).

This action, which was filed in the District Court on November 9, 1945, was brought for an accounting and money decree for sums claimed by Petitioners because of Respondent's alleged violation of a labor agreement. Federal jurisdiction was predicated upon diversity of citizenship (R. 2, 3). In substance, the claim of Petitioners is that Respondent in some unspecified way violated the provisions of the Chicago Memorandum of Agreement, a written agreement pertaining to wages, hours and working conditions, entered into between the General Managers' Committee representing various rail-

road corporations and the Brotherhood of Railroad Trainmen, of which Petitioners were members (R. 2, 3). Petitioners averred that the alleged violations began on August 13, 1926 and ended on December 12, 1938 (R. 5). Petitioners apparently claim that as a result of Respondent's alleged violations, some of them were at unspecified times deprived of "a minimum day" and that others were required in addition to their own work to perform the work of those Petitioners who were deprived of their "minimum day" (R. 4). Petitioners' demand appears to be that certain of them be paid a full day's pay for every day "lost" on which they performed no work, and that others in addition to pay already received by them for their work be paid an additional day's pay at the rate of time and one-half for those days on which the other Petitioners were deprived of their "minimum day" (R. 4, 5).

SUMMARY OF ARGUMENT.

I.

The only question presented by the petition is whether the Seventh Circuit Court of Appeals followed the applicable Illinois law as determined by the decisions of Illinois courts. It is conceded that Illinois law is controlling. The applicable Illinois law has been declared authoritatively by the decisions of state courts, and such decisions were followed, correctly, by the Circuit Court of Appeals. Under such circumstances this court will not grant a further review.

II.

The decisive question of local law involved is whether the Illinois five or ten year limitations statute is applicable. It has long been established by Illinois decisions that claims of the type presented by petitioners are subject to the five year statute. The decision of the Circuit Court of Appeals does not bar any employees from exercising their rights to institute suits against their employers within apt time. Its sole effect is to bar a suit on an alleged cause of action arising under Illinois law which was not brought within the time limit prescribed by statute in Illinois.

ARGUMENT.

I.

The only point raised in the petition is whether the Seventh Circuit Court of Appeals followed the applicable Illinois law in its decision. The statute involved is Section 15 of the Illinois Limitations Act (Ill. Rev. Stat. 1945, Ch. 83, Sec. 16), which reads:

> "Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

Petitioners concede, as they must, that the Circuit Court of Appeals was correct in holding that it must apply the above statute in accordance with the interpretation given to it by the Illinois courts. *Erie* v. *Tompkins*, 304 U. S. 64; *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630. Both the Supreme Court and Appellate Court of Illinois have passed upon the question presented to the Circuit Court of Appeals in this case. The Federal Courts will follow decisions of the Illinois Appellate Court on any point upon which the Illinois Supreme Court has not passed. *West* v. *American Tel. and Tel. Co.*, 311 U. S. 223.

In holding petitioners' suit barred by the Illinois five year limitations statute, the Circuit Court of Appeals cited and followed four Illinois decisions: *The Railway Passenger and Conductors' Benefit Ass'n.* v. *Loomis*, 142

Ill. 560; *Mowatt* v. *City of Chicago*, 292 Ill. 578; *Novosk* v. *Reznick*, 323 Ill. App. 544; and *Orminski* v. *Hyland Electrical Supply Co.*, 326 Ill. App. 392. Petitioners' argument in support of their petition is devoted largely to a vain attempt to distinguish those cases.

Petitioners have not cited any contrary decision nor any decision in support of their contentions.

It clearly appears from petitioners' complaint filed in the District Court that no part of the alleged cause of action of any of them accrued within five years next before this action was commenced. Their suit was filed on November 9, 1945 (R. 2). The last date on which any violation of the Chicago Memorandum of Agreement by respondent was claimed in the complaint was December 12, 1938 (R. 4, 5).

A copy of the Chicago Memorandum of Agreement, upon which petitioners relied, was attached to their complaint as Exhibit 1 (R. 8). The complaint alleged that that agreement was "entered into by and between the General Managers' Committee representing various railroad corporations and the Brotherhood of Railroad Trainmen." (R. 3). Petitioners are not named in the Chicago Memorandum of Agreement (R. 8). Parol evidence would be necessary to show any contractual relationship between petitioners and respondent. Parol evidence would be necessary to show that petitioners are or were at any time employed by respondent. If petitioners were employed by respondent, parol evidence would be necessary to show that at any pertinent time they were employed in work of the type covered by the Chicago Memorandum of Agreement. That agreement purports to cover only rules and rates of pay of yardmen (R. 8). Parol evidence would be necessary to show that petition-

ers were employed at a place or within a territory to which the Chicago Memorandum of Agreement was applicable. That agreement purports to apply only to the Chicago Switching District (R. 8). With this state of facts the Illinois cases cited by the Circuit Court of Appeals make it clear that the Illinois five year limitations statute is applicable.

The Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association v. *Loomis*, 142 Ill. 560. (1892) is a leading case in Illinois on the question here involved, and has been cited and followed many times by Illinois courts.* That was an action by plaintiff to recover benefits claimed to be due by reason of the death of her husband. The only question considered by the court was whether the action was barred by the five year limitation statute. The court pointed out that if there were a written contract it would consist of the certificate of membership of plaintiff's deceased husband and the constitution and by-laws of defendant. The certificate certified that H. H. Loomis was a member of the association. It did not mention his wife, the plaintiff, nor did the constitution and by-laws refer to her in any way. In holding that the action was barred by the five year statute the court said:

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* Among such cases are *Conductors' Benefit Assoc.* v. *Tucker*, 157 Ill. 194, 205; *Gronowski* v. *Jozefowicz*, 291 Ill. 266, 277; *Mowatt* v. *City of Chicago*, 292 Ill. 578, 582; *Murphy* v. *Cicero Lumber Company*, 97 Ill. App. 510, 516; *Rittenhouse & Embree Co.* v. *Barry*, 98 Ill. App. 548, 554; *Speich* v. *A. T. & Santa Fe Ry. Co.*, 178 Ill. App. 266, 272; *Jacksonville Hotel Bldg. Corp.* v. *Dunlap Hotel Co.*, 264 Ill. App. 279, 323; *Ellithorpe* v. *Holmes*, 305 Ill. App. 625 (see Appendix); *Richey* v. *Northwestern University*, 323 Ill. App. 293 (see Appendix). *Novosk* v. *Reznick*, 323 Ill. App. 544, 551.

"It is clear, therefore that parol testimony must be resorted to, in order to connect the plaintiff with the contract as a party thereto. It must be shown by parol evidence, that Loomis did not leave a will, and that he did leave a widow, and that plaintiff is his widow.

A contract cannot be said to be in writing, unless the parties thereto, as well as the terms and provisions thereof, can be ascertained from the instrument itself. If the party to a written contract is not named therein, the contract is defective as containing only a part of the agreement. In such case, the agreement is only partly reduced to writing, because parol proof must be resorted to, in order to show with whom the bargain was made." (p. 567) • • •

But the constitution and by-laws merely designate in a general way certain classes of persons, who will be entitled to the benefit fund upon the death of a member; and parol evidence must be introduced to show that the plaintiff belongs to one of the designated classes. It must be proven by parol, not that the plaintiff is the particular person named in a certain writing, but that she possesses the qualifications which, under the constitution and by-laws, all persons must possess, who are entitled to receive the benefit fund. Hence, the written contract here sought to be set up is defective in necessitating the introduction of parol testimony in order to make it complete." (pp. 568-569).

Plaintiff in the above case was barred by the five year statute because, not being named in the written instrument, she had to show by parol that she possessed the qualifications to entitle her to the benefit of the contract. Petitioners in the case at bar must also do that. They would have to show by parol that they possess the qualifications to entitle them to any benefits of the agreement upon which they rely. They would have to show by parol the existence of any contractual relationship whatsoever between them and respondent.

In *Mowatt* v. *City of Chicago,* 292 Ill. 578, discussed by petitioners (p. 8), the court held that conceding the action to be based on the ordinance in question, the contract was an oral one, as to the Statute of Limitations, because parol evidence was necessary to show that there could be a recovery under the ordinance, saying:

> "This court has held that a written contract is one in which all of its terms are in writing; that a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute" (p. 582).

In that case the oral testimony necessary was to show that the ordinance in question had been accepted by plaintiff; that the money had been paid to the City as provided therein, and that the five year statute of limitations had run against claims for damages against the City as to persons claiming injury from the vacation of the alley.

As pointed out by the Circuit Court of Appeals (R. 31) their decision in *Economy Fuse & Mfg. Co.* v. *Raymond Concrete Pile Co.,* 111 F. 2d, 875, is not contrary to the above Illinois cases nor is it contrary to their decision in this case.

Novosk v. *Reznick,* 323 Ill. App. 544, 551 (1944), is another case indistinguishable in principle from the case at bar. In that case plaintiffs, as operators of defendants' motor buses sued for the difference between what they received from the defendants and the amount which the defendants contracted in writing with the Works Progress Administration to pay operators. At the trial it was stipulated that plaintiff, Novosk, worked for the defendant, from June 22, 1936, to July 10, 1937, as a bus

driver engaged in carrying WPA workers to WPA projects. Novosk's suit was not filed within five years after July 10, 1937. After a review of the Illinois decisions on the question the court held that Novosk's action was barred by section 15 (five year) of the limitations act saying:

> "We are therefore impelled to hold that as parol testimony must be resorted to, to show the existence of a contractual relationship between the plaintiffs and the defendants, plaintiff Novosk's action was barred by the 5-year statute of limitations, not having been commenced within five years from July 10, 1937."

Petitioners' attempt to distinguish the above case by stating (p. 10) that they "were not third party beneficiaries to the written contract but were direct beneficiaries in it." No such distinction exists and even if it did it would not affect the application of the statute of limitations. It is settled under the law of Illinois that a third party beneficiary cannot sue at all on an agreement unless it is made for his direct benefit. *Timley* v. *City of Chicago,* 134 F. 2d, 682, certiorari denied 320 U. S. 759; *Sachs* v. *Ohio Nat. Life Ins. Co.,* 148 F. 2d, 128; *Cherry* v. *Aetna Casualty & Surety Co.,* 372 Ill. 534, 25 N. E. 2d, 11.

In *Orminski* v. *Hyland Electrical Supply Co.,* 326 Ill. App. 392, 398 (1945), plaintiff brought an action for overtime wages as a truck driver at the hourly rates prescribed for such overtime in written contracts between defendant and plaintiff's labor union. Plaintiff alleged that during the time involved he was a member of the union and was employed as a truck driver by defendant. With reference to the application of the five year statute of limitations the Illinois Appellate Court said the following:

"After the order of dismissal was entered plaintiff made a motion for a ruling on that part of defendant's motion which sought to strike from the complaint all claims for overtime not accruing within the five years from the commencement of the action. The court on hearing sustained defendant's motion and held upon the record then before it that plaintiff's action was covered by the five year statute of limitations governing oral contracts, because it would be necessary to resort to parol evidence to show that plaintiff was a member of his union and therefore entitled to the benefits of the contract between defendant and the union. This ruling is correct. *Novosk* v. *Reznick,* 323 Ill. App. 544, 549-551."

Petitioners' sole contention with respect to the above case appears to be that "it does not appear from the record that plaintiff there argued the legal effect of the motion to dismiss the complaint was to admit his direct allegation of fact." (p. 11). Respondent submits that it may be presumed that the Illinois Appellate Court knew the legal effect of a motion to dismiss. The fallacy of petitioners' argument (pp. 10-12) with respect to the legal effect of a motion to dismiss is obvious. That the instrument relied upon by petitioners is not a "written instrument" within the Illinois limitations act can be determined from the instrument itself, a copy of which was attached to their complaint (R. 8). That instrument on its face fails to show any contractual relationship between petitioners and respondent. It fails to name any of petitioners or to show that any of them is in any way connected with it or entitled to any benefits under it.

The cases of *Richey* v. *Northwestern University,* 323 Ill. App. 293, and *G. S. Ellithorpe* v. *Holmes,* 305 Ill. App.

625* are also directly contrary to petitioners' argument as to the legal effect on a motion to dismiss. In both of those cases the question was presented on motion to dismiss as to whether the five or the ten year statute of limitations was applicable. Both of those decisions followed the state law established by *Conductors' Benefit Ass'n.* v. *Loomis,* 142 Ill. 560, holding that the causes of action were barred by the five year statute, contrary to the contention of the plaintiffs that their actions were based on written contracts.

It is also clear that a motion to dismiss is proper under federal procedure whenever the time alleged in the statement of claim shows that the alleged cause of action has been barred by elapse of the statutory period. *Wright* v. *Bankers Service Corp.,* 39 Fed. Supp. 980; 1 Moore's Federal Practice, p. 597; 4 Moore's Federal Practice, p. 171.

On the basis of the foregoing, respondent submits that both the District Court and the Circuit Court of Appeals followed correctly, the controlling state law and that this court will, therefore, refuse to grant a further review. This court said in *Huddleston* v. *Dwyer,* 322 U. S. 232, 237:

> "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. *Ruhlin* v. *New York Life Ins. Co., supra.*"

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* The opinions in both of these cases are published only in abstract form in the Official Reporter. Respondent is therefore attaching copies of these opinions as an appendix to this brief and is filing certified copies of these opinions with this brief.

II.

Petitioners have suggested in their petition (p. 3) that this court should grant a writ of certiorari because the decision of the Seventh Circuit Court of Appeals in this case bars thousands of employes in various industries from exercising their rights under the Illinois law to institute action against their employers. It is obvious of course that that is not the effect of the opinion of the Circuit Court of Appeals. An enactment of the General Assembly of Illinois limits to five years the time within which such actions may be brought. Petitioners do not and could not contend that the General Assembly was without power to enact such a limitation nor that such a limitation is unreasonable. Nothing in the opinion of the Circuit Court of Appeals prevents the institution and prosecution of suits by employees against their employers within apt time.

It is respectfully submitted that the decision of the Circuit Court of Appeals is correct. Petitioners have been unable to cite any contrary or conflicting authority.

Respondent prays that the petition be denied.

SIDNEY C. MURRAY,
MARVIN A. JERSILD,
Attorneys for Respondent.

December 24, 1946.

APPENDIX.

42819
Dr. Earl L. Richey,
Appellant,

v.

Northwestern University,
a corporation,
Appellee.

} Appeal From Superior Court Cook County,

Mr. Justice Matchett Delivered the Opinion of the Court.

Dr. Richey averring wrongful discharge sued January 14, 1943. He filed a complaint of two counts, the first composed of 16, the second 15 verified paragraphs. A motion to dismiss was denied. Defendant then filed a verified answer to each paragraph of both counts. March 1, 1943, plaintiff filed an additional count of 18 paragraphs, verified. March 31, 1943, defendant made a motion to strike the entire complaint and each count of it to dismiss plaintiff's action, and asked for summary judgment in its favor against the plaintiff. This motion was made under Sections 45, 48 and 57 of the Civil Practice Act. Under Rule II of the Supreme Court, the defendant incorporated as a part of its motion its answer formerly filed on February 15, 1943, to Counts 1 and 2. Suggestions for and against were filed. Among other things it was suggested the supposed causes of action alleged were inconsistent with and repugnant to each other and did not accrue within the time limited by law for the commencement thereof (Chap. 83 Ill. Rev. Stat., § 15, par. 16, § 16, par. 17). It was pointed out that if the cause

of action accrued at all, it was either on April 13, 1934, or not later than September 1, 1934, which, in either case, would be more than five years before the filing of the suit. Defendant prayed the amended complaint be stricken, the action dismissed and final summary judgment for defendant entered. The motion was granted and judgment so entered July 2, 1943.

Afterwards, on July 9, 1943, plaintiff moved for an amended order to the effect that the final judgment of July 2, 1943, was in no way based on the Statute of Limitations for the reason that this defense could not be validly and legally raised by motion but only by way of plea or answer. This motion was denied.

The appeal seems to turn on the question of whether the suit is barred by Section 16 of the Limitations Act. The material facts pleaded are, in brief, that in August, 1926, Dr. Richey was employed as an instructor in defendant's college of dentistry at a salary of $3600 per year. The Dean of defendant's college sent two telegrams to him about the matter. These offered to employ him for full time for one year at a salary of $3600 per year, with the expectation of an increase after the first year if all was satisfactory with defendant. Plaintiff accepted October 1, 1926, entered the service of defendant and served for a year. July 16, 1927, plaintiff was notified in writing he was to be promoted to the office of Assistant Professor of Prosthetic Dentistry in the faculty. Later, at a meeting of defendant's Board of Trustees, August, 17, 1927, as appears from minutes made a part of the pleading, this promotion was approved. In August, 1928, plaintiff was again promoted to be an Associate Professor in the dental college of defendant by resolution, which is set out in the pleadings. Plaintiff again accepted and entered into the office or employment and continued to hold

it for a period of about six years, when, it is alleged, he was wrongfully discharged. In the first part of the pleading the date of this wrongful discharge is alleged to have been April 13, 1934; in another part, as not later than September 1, 1934. The suit was begun January 14, 1943.

If Section 15 (the five-year section) of Chapter 83, Illinois Revised Statutes, is applicable, this cause of action was barred when it was begun, unless waived or extended for some reason. If Section 16, (the ten-year section) is applicable, then the suit is not barred.

Plaintiff first contends that the defense of the Statute of Limitations cannot be raised on this record. He says it cannot be raised by motion but only by way of plea or answer. He says he had a legal right to make an affirmative reply to this defense and that this could not be done on a motion to dismiss. Plaintiff specifically raised this point in the trial court by motion made after the entry of judgment. The court denied the motion, we hold, rightly.

Section 48 (f), par. 172 of the Civil Practice Act, names as one of the causes for dismissal of an action that it "did not accrue within the time limited by law for the commencement of an action or suit thereon". Plaintiff says the court erred in not permitting a replication to this defense to be filed. We hold otherwise. Under paragraph 3 of the same section plaintiff had the right to show if he could that the suit was not barred. When leave was given to file the third count the order granted leave to defendant to answer the complaint, as amended, and plaintiff made no objection then or since. The effect of this was, we hold, under the sections of the Civil Practice Act above named, to open up the whole matter of pleading. The motion for leave related back to the entire

complaint, including the first, second and third counts. The answers theretofore filed, therefore, did not waive the Statute of Limitations. The result is, if Section 15 is applicable to the facts as alleged (in other words, if the suit is on an unwritten contract) it is barred. If Section 16, as to written contract, is applicable, then the suit is not barred. We hold the contract sued on is unwritten, not written, within the meaning of the Statute of Limitations. The action is therefore barred. *Knight* v. *Railway Co.*, 141 Ill. 110, 115; *Conductors Benefit Ass'n* v. *Loomis*, 142 Ill. 560, 571-2; *Pond Creek Mill & Elevator Co.* v. *Clark*, 270 Fed. 482, 485; *Mowatt* v. *City of Chicago*, 292 Ill. 578, 581-3; *I. C. R. R.* v. *Miller*, 32 Ill. App. 259, 267-8.

The leading cases in the classification of written as distinguished from unwritten contracts and from the standpoint of the Statute of Limitations are cited in the briefs. Again, as often before, we have perused them. We doubt much whether anything we might write on this subject would add to the sum of legal knowledge. When it comes to classification the first rule of logic is necessary. A thing must either be or not be. A thing cannot be a "writing" and "not a writing" at the same time for classification purposes. This suit cannot be reasonably said to be based upon a written contract. We have not overlooked Williston on Contracts, Rev. Ed., Vol. 1, § 568, nor the Restatement of the Law of Contracts, §§ 207, 208 and 209, cited by plaintiff. The motion made, as we understand the practice, searched the whole record and on that record plaintiff could not recover. The judgment is therefore affirmed.

Affirmed.

40511

G. S. Ellithorpe, Appellant,

v.

Glenn E. Holmes, Appellee.

Appeal From Circuit Court Cook County,

Mr. Justice Scanlan Delivered the Opinion of the Court.

Plaintiff sued in contract to recover for brokerage commissions. Defendant filed a written motion to strike the amended complaint and dismiss the cause upon the ground, *inter alia*, that the alleged cause of action was barred by the five-year statute of limitations. The trial court sustained the motion and dismissed the suit. Plaintiff appeals.

The amended complaint alleges that prior to March 12, 1937, defendant employed plaintiff, a licensed real estate broker, as exclusive real estate broker to negotiate for the sale, sublease, transfer, or other disposition of the interest of defendant in certain described real property located in Chicago; "that thereupon and thereafter the said defendant * * * confirmed in writing the said employment, in words and figures as follows:

"March 12th, 1927

"Mr. G. S. Ellithorpe,
"137 Merrill Avenue,
"Park Ridge, Illinois

"Dear Sir:

"This will confirm our verbal understanding that you are to act as exclusive broker for my interests in the property located at numbers 22 to 36 West Lake Street,

this city, and I hereby authorize you to negotiate for the sale, sub-lease, transfer or other disposition of same; it being understood that all terms or conditions of any negotiations are to be subject to my agreement in writing.

"Yours very truly,

"(signed) Glenn E. Holmes."

The complaint further alleges that pursuant to the said employment plaintiff negotiated for the disposition of defendant's interest in the property and that as a result of his services as such broker a contract of sale was entered into on November 26, 1927, between defendant and certain transferees, etc., of said interest, and thereafter on December 27, 1927, the transaction between the said parties was consummated. The complaint then sets up that the consideration for the transfer of the property was 208 shares of stock of the Dearborn-Lake Building Corporation, which was then and there of the market value of $250,000; that "the usual reasonable and customary brokerage commissions for the services performed by plaintiff aforesaid, on and about the months of November and December, 1927, was 3% computed on the basis of the value of the consideration of such sale, transfer and assignment as aforesaid, of $250,000, or $7,500 commission."

Plaintiff contends that "the writing sued upon is a written contract and that the five-year statute of limitations has no application," and that the ten-year statute of limitations applies. Defendant contends: "1. The obligation of the defendant on which recovery is sought is an implied promise to pay plaintiff the reasonable value of his services, hence an oral contract within the statute of limitations and barred by the lapse of five years. 2. The letter recited in the amended complaint is merely evidence of the employment of plaintiff by de-

fendant but does not constitute a written contract between them within the meaning of the statute of limitations as distinguished from a written *memorandum* under the statute of frauds. The cause of action on which recovery is sought is based on the employment plus performance by the defendant which, by operation of law, entitles plaintiff to an action for commissions. The letter is of evidentiary value should defendant deny the employment, but the gravamen of the action is the implied obligation."

The original complaint was filed November 23, 1937. Plaintiff's cause of action as alleged in the amended complaint arose November 26, 1927. It seems plain to us that under the settled rule of law in this State plaintiff's action was upon an implied contract and therefore the five year statute of limitations applies. The letter set forth in the amended complaint confirms the employment of plaintiff as broker but makes no mention of compensation. Indeed, the amended complaint does not allege any promise by defendant, express or implied, to compensate plaintiff for the latter's services as real estate broker. But where brokers are employed to sell a piece of real estate there is an implied obligation to pay the customary and reasonable compensation for the services performed.

An action upon an implied contract must be brought within five years after the cause of action accrued. (*Mowatt* v. *City of Chicago*, 292 Ill. 578). In that case the court said (p. 582): "In this State it has been held that if the action is brought upon a mere implied undertaking the five year Statute of Limitations controls. (*Knight* v. *St. Louis, Iron Mountain and Southern Railway Co.*, 141 Ill. 110; *Bates* v. *Bates Machine Co.*, 230 id. 619). This court has held that a written contract is one in which all of its terms are in writing; that a contract partly in

writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute. (*Conductors' Benefit Ass'n.* v. *Loomis,* 142 Ill. 560). The following authorities support same conclusions: 25 Cyc. 1042; 1 Wood on Limitations, (4th ed.) sec. 57f, and cases cited; Bishop on Contracts, secs. 197-203, incl.; 3 Page on Law of Contracts, (2d ed.), sec. 1500, and authorities cited; *Dodd* v. *Board of Education,* 122 Cal. 106." (See, also, *Junker* v. *Rush,* 136 Ill. 179, 184).

The letter in the amended complaint is undoubtedly evidence of the transaction between the parties, but to establish his claim plaintiff would be obliged to introduce oral testimony to prove the reasonable and customary commission for services such as plaintiff performed. Defendant would then have the right to introduce oral testimony to rebut that offered by plaintiff. As stated in the *Mowatt case* (p. 582): "* * * a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute [statute of limitations]."

Plaintiff contends that the trial court committed reversible error in denying him the right to amend his amended complaint. It is conceded that the judgment of the trial court was predicated upon the ground that the five-year statute of limitations applied. Plaintiff had already filed an amended complaint. He did not submit to the trial court a second amended complaint and so far as the record shows no showing was made that plaintiff could have avoided the five-year statute by alleging a different cause of action arising out of the transaction in question, nor does plaintiff attempt to show this court how a second complaint would have aided his cause. He simply asserts

that the action of the trial court wiped out his rights. In view of the record before us, we certainly would not be warranted in holding that the trial court committed reversible error in denying plaintiff's motion for leave to file a second amended complaint.

The judgment of the Circuit Court of Cook County is affirmed.

Judgment Affirmed.

Sullivan, P. J., and Friend, J., concur.